



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

June 23, 2005

Ms. Laura Garza Jimenez
County Attorney
Nueces County
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2005-05570

Dear Ms. Garza Jimenez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226564.

The Nueces County Judge's Office (the "judge's office") received a request for information relating to transactions between Nueces County and Amtex Security, Inc. ("Amtex"), including any contracts and correspondence.¹ You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. You also indicate that the request may involve the third party proprietary interests of Amtex. Accordingly, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, you notified Amtex of the request for information and of its right to submit arguments explaining why the information concerning the company should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

First, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if

¹We note that the Nueces County Attorney's Office received the request for information, but forwarded it to the judge's office, which is the entity that maintains the responsive information.

any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Amtex explaining how the release of the submitted information will affect its proprietary interests. Thus, Amtex has not demonstrated that any of the submitted information is proprietary for purposes of the Act. *See* Gov't Code § 552.110; *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the judge's office may not withhold any of the requested information on the basis of any proprietary interest that Amtex may have in the information.

We now address your arguments concerning the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential by other statutes. You assert that Amtex's taxpayer identification number, as reflected on the Form W-9 included in the submitted information, is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of . . . income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary* [of the Internal Revenue Service] with respect to *a return* or . . . the determination of the existence, or possible existence, of *liability* . . . for any tax, penalty, . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). We find Form W-9 does not fall within the purview of section 6103 because it does not constitute return information as contemplated thereby. As such, the judge's office may not withhold the submitted Form W-9 or the corresponding taxpayer identification number under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

Next, we address your claim regarding section 552.108 of the Government Code. Section 552.108(b)(1) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution." This provision is intended to protect

“information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You seek to withhold the information submitted as Exhibit 4 under section 552.108(b)(1). Specifically, you argue that release of Amtex’s security guard schedules and the guard’s cellular telephone number would interfere with law enforcement. You inform us that the Nueces County Sheriff’s Department (the “sheriff”) generally provides the security for the Nueces County Courthouse. However, you explain that Amtex provided “after hours and weekend security . . . coordinated through the Sheriff” for the courthouse. Although you state that Amtex no longer provides these security services, you state that the sheriff, in conjunction with the judge’s office, determined the submitted guard schedules “to be the most vulnerable hours wherein the security of County employees . . . and the Courthouse itself was at risk.” With respect to the cellular telephone number, you state that guards “have been assigned the telephone” for purposes of communicating with one another while on duty. You claim that a “potential criminal could purposefully distract the guard by calling him on his cell phone or could simply tie up his cell phone so that the guard could not contact others[.]”

Although the judge’s office is not a law enforcement agency for purposes of section 552.108, you have provided an affidavit from the sheriff asserting that release of this information would interfere with law enforcement. Upon review of the submitted records, your arguments, and the sheriff’s representations, we find that you have established that release of the scheduling information and cellular telephone number would interfere with law enforcement. Therefore, we have marked this information that the judge’s office may withhold pursuant to section 552.108(b)(1). As for the remaining information in Exhibit 4, we find that you have failed to explain how its release “would interfere with law enforcement or prosecution.” Thus, none of the remaining information in Exhibit 4 may be withheld under section 552.108(b)(1).

Lastly, we note that Exhibit 5 contains insurance policy numbers that are subject to section 552.136 of the Government Code. This section states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. We have marked the policy numbers that must be withheld in accordance with section 552.136.

In summary, the judge’s office may withhold the information we have marked in Exhibit 4 under section 552.108(b)(1) of the Government Code. The insurance policy numbers we have marked in Exhibit 5 must be withheld under section 552.136 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 226564

Enc. Submitted documents

c: Ms. Nancy Martinez
Corpus Christi Caller-Times
P. O. Box 9136
Corpus Christi, Texas 78469
(w/o enclosures)

Mr. Robert Lott
Amtex Security, Inc.
P. O. Box 1837
Corpus Christi, TX 78403